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ONE HUNDRED EIGHTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON THE JUDICIARY

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March 11, 2004

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Honorable R. Alexander Acosta
Assistant Attorney General
for Civil Rights
Civil Rights Division
US Department of Justice
950 Pennsylvania Avenue
Washington, DC 20530

Dear Mr. Acosta:

Pursuant to a unanimous consent request allowing members of the Subcommittee on the Constitution of the House Judiciary Committee to submit additional questions in writing to you for written responses for the record, we are writing to ask you the following additional questions. As you know, the purpose of last week's hearing was to fulfill our obligation to provide oversight over the federal agencies within the jurisdiction of the Subcommittee. Through these hearings, we endeavor to ensure that the laws and programs enacted and funded by Congress are being carried out appropriately and effectively. We appreciate your willingness to respond to these questions.

Data Requests:

Prior to the hearing, our staff requested data on the dockets for each section of the Division. At the hearing you stated that the material had to be assembled, but would be forthcoming. When can we expect to receive this information?

How much staff time (including attorneys) was allocated to police pattern and practice investigations and litigation during this fiscal year and the previous four fiscal years, on a quarterly basis. Please note the number of attorneys in the Special Litigation Section logging time to police matters relative to the overall number of attorneys in the section for each year.

How much staff time (including attorneys) was allocated to CRIPA investigations and litigation during this fiscal year and the previous four fiscal years, on a quarterly basis. Note the number of attorneys in the Special Litigation Section logging time to CRIPA matters relative to the overall number of attorneys in the section for each year.

Honorable R. Alexander Acosta
Page Two
March 11, 2004

How many investigations have been commenced against states and how many lawsuits have been filed against states since 2000. Note the name of the Attorneys General of the states in question.

Partial Birth Abortion Act:

If upheld, the Civil Rights Division would be charged with enforcing the Partial Birth Abortion Ban Act. Do you believe this is an appropriate statute for the Civil Rights Division to enforce?

Whose civil rights do you believe your division would be charged with protecting in these cases?

Do you have a plan for allocating resources to take up your enforcement duties as assigned by the Attorney General? How many attorneys do you think you would need? Which sections would be charged with doing this enforcement work?

The President's FY 2005 budget has proposed cuts to the Civil Rights Division of \$1.62 million, and 15 FTEs (Full Time Equivalent Positions). From where would these resources be drawn?

How do you plan to devote resources to enforcing the Partial Birth Abortion Act in conjunction with implementing these cuts? From which areas would you draw resources in order to take on these new responsibilities?

Subpoena of Women's Health Records:

As part of its legal strategy to defend the Partial Birth Abortion Act, the Department of Justice has subpoenaed the records of women who had abortions and clinics and hospitals around the country in the last two years. In those cases, the Department has argued that there is no federal common law doctor patient privilege. Is that your understanding of current law? Do you believe that patient medical records should be entitled to no doctor-patient privilege whatsoever?

Discrimination in Federally Funded and Government Programs:

Part of the Division's responsibilities has to do with discrimination in federally funded programs. Federal funds are, for the first time, being given to organizations that discriminate in employment on the basis of religion. These organizations are not religious organizations covered by the employment discrimination exception in section 702 of the Civil Rights Act of 1964. As part of your Division's duties in advising other federal agencies, have you been consulted on this question, and if so, what role have you played and what advice have you given?

Honorable R. Alexander Acosta
Page Three
March 11, 2004

Office of Special Counsel web site:

Recently the Office of Special Counsel, which is not part of the Justice Department, removed information concerning discrimination against federal employees on the basis of sexual orientation from its web site. In response to an inquiry from the Ranking Members of the Full Committee and this Subcommittee, the Special Counsel apparently believed, on the basis of a power point presentation, that the basis of the office's policy was "unclear." Are you aware of any changes in law or regulation that might have called into question this longstanding policy, especially in light of the Supreme Court's decision in *Lawrence v. Texas*?

Housing:

The Department of Housing and Urban Development's Fair Housing and Equal Opportunity program, which helps enforce title XIII of the Civil Rights Act of 1964 and the Fair Housing Amendments of 1988, is slated to receive \$48 million in the President's FY 2005 budget, which, according to the Budget Committee, is a cut in current services dollars of \$1 million (a nominal increase of \$1 million). Given the fact that HUD's allocation is essentially flat, how will the Division allocate resources to pursue the expansion of fair housing and fair lending work?

Civil Monetary Penalty Recovery – The housing and lending work undertaken by the Division is undeniably complex, time consuming and expensive. Given the budget constraints faced by the Division, would you support legislation that would allow the Division to keep a significant portion of the "civil monetary penalties" awarded in these cases, which is the norm in other enforcement areas –e.g., healthcare fraud and procurement.

Civil Rights of Institutional Persons Act (CRIPA):

Since the administration has made enforcement of CRIPA priority, what is your position on giving the Division subpoena power to improve enforcement capabilities?

Texas Redistricting:

In your testimony before the Subcommittee, you stated the reasons for disqualification are not given by Department officials. Notwithstanding a revision of the materials enclosed in a November 21, 2003, letter from William E. Moschella, Assistant Attorney General for Legislative Affairs, we are aware of no official DOJ policy to this effect. To the contrary, during the 1992 redistricting, Assistant Attorney General John Dunne recused himself from reviewing the redistricting submission of the New York State Senate, he announced that he was doing so because he had at one time served as a State Senator in New York.

In view of that precedent, and the absence of any clear policy directive, please provide the reasons you have for disqualifying yourself from reviewing the Texas Congressional Redistricting Plan under the Voting Rights Act.

Honorable R. Alexander Acosta
Page Four
March 11, 2004

With respect to the Texas Congressional map that the Voting Rights Section precleared under Section 5 of the Voting Rights Act on December 19, 2003, please provide responses, including requested materials, to the following questions. To the extent that you are unable to respond to these questions because of your recusal, please designate an individual within the Division with the knowledge and the authority to provide proper responses and direct that individual to respond.

Joseph Rich Signature Issue

Isn't it the normal practice of the Voting Rights Section that the Division Chief signs preclearance letters? Joseph Rich, the Chief of the Section, did not sign the Texas December 19th preclearance letter. Instead, it was signed by Mr. Sheldon Bradshaw. Can you explain why Mr. Bradshaw, a political appointee, signed the letter instead of Mr. Rich, the division chief?

Voting Section Texas Memorandum

It has been the usual practice of the Voting Section of the Civil Rights division over the last 38 years to release, pursuant to a request under the Freedom of Information Act, copies of memoranda prepared by the Voting Section career attorneys in connection with preclearance submission made by covered jurisdictions. A FOIA case was made for the memorandum prepared by the staff of the Voting Section in which the staff reportedly recommended an objection to the Texas congressional redistricting plan. In an unprecedented ruling, the Civil Rights Division leadership instructed the Office of Privacy and Freedom of Information not to release the memorandum. What were the legal and factual basis for this decision?

The chief FOIA officer in your division, Mr. Nelson Hermanilla, recently informed an interested citizen that the professional staff of the Voting Rights Section prepared a 73-page memorandum regarding the decision to preclear the Texas plan. It appears that the professional staff, the experts who spent the most time studying the Texas submission, had a lot to say about the State of Texas' submission. In contrast, the letter from Mr. Bradshaw, the political appointee, is only three paragraphs. Does this suggest to you that the professional staff might have objected to all or part of the Texas submission?

We are formally requesting that you submit this memorandum to this Committee forthwith.

Gag Order

For the first time in the history of the enforcement of the Voting Rights Act, a gag order was imposed on attorneys in the Voting Section who handled the Texas congressional redistricting submission. This gag order was so strict that career attorneys were not even

Honorable R. Alexander Acosta
Page Five
March 11, 2004

permitted to talk with one another about the plan, a practice they have engaged in for years in an effort to explore the factual and legal issues that can accompany a redistricting submission. Did you approve this gag order and if not who did? Also, why was it imposed? More generally, is it a common practice in the Civil Rights Division to prevent attorneys from communicating with each other?

Other Voting Rights Act Activities

Please indicate the number of times, since beginning of the Bush Administration, that a recommendation by the career staff of the Voting Rights Section of the Division on any submission by a State or locality under Section 5 of the Voting Rights Act has been reversed, modified, or disregarded by one or more of the Division's political appointee officials. Please include: (a) all instances where approval was recommended but the Division's political appointees disapproved the submitted change or sought more information; (b) all instances where the career staff recommended that a submission be disapproved, and the Division's political appointees approved it; (c) all instances where the career staff recommended that more information be sought from the submitting jurisdiction, yet the political appointees approved the submission without obtaining further information; and (d) all instances where the Division's political appointees sought additional information not requested by career staff. Please specify separately the number of instances in each of these categories.

Voting Rights Act Reauthorization:

Section 5 of the Voting Rights Act will be up for reauthorization in 2007. Could you detail the administration's position on reauthorization. Do you agree that it should be reauthorized? Have you identified any changes you believe are necessary? Does the administration believe any changes are necessary?

Identify the name and filing date of each case alleging a Voting Rights Act violation(s) that the Civil Rights Division has filed under the current Administration;

Identify the name and filing date of each case alleging vote dilution under Section 2 of the Voting Rights Act that the Civil Rights Division has filed under the current Administration.

Identify the number of times under the current Administration that the Assistant Attorney General (or the individual designated to act as Assistant Attorney General) has not agreed with the recommendation of the Voting Section to interpose a Section 5 objection.

Identify the number of times under the current Administration that the Assistant Attorney General (or the individual designated to act as Assistant Attorney General) has not agreed with the recommendation of the Voting Section to bring a lawsuit.

Honorable R. Alexander Acosta
Page Six
March 11, 2004

Identify the number of times under the current Administration that the Assistant Attorney General (or the individual designated to act as Assistant Attorney General) has disagreed with the recommendation of the Voting Section to cover an election. Please list the cases and reasons for the failure to follow the recommendations of the career staff.

For every recommendation made by the Voting Section in 2002 and 2003 to bring a Section 2 vote dilution lawsuit, identify the number of days that elapsed between the date the recommendation was first received by the "front office" (or, if that date cannot be identified, the date of the recommendation in the J-Memo) and the date that Assistant Attorney General (or the individual designated to act as Assistant Attorney General) either approved or disapproved the recommendation. To the extent that there are recommendations made in 2002 or 2003 which are still pending, indicate how long those recommendations have been pending.

Law Enforcement Accountability:

We have heard concerns that there has been retrenchment in the area of pattern and practice enforcement under Section 14141. With the notable exception of Detroit, the Division has entered a series of agreements that lack "substantial compliance" requirements, most recently in Prince George's County Maryland. Why have you departed from the 5 year consent decree, with 2 year substantial compliance, model that was followed in the past? In some place, like Cincinnati, where there was violence, there is no requirement of substantial compliance in the agreement. Please explain the justification for this departure from past practice.

Tulia, TX, Drug Sting:

What happened to the Civil Rights Division investigation into events taking place in 1999 in Tulia, Texas?

What has the Civil Rights Division done, if anything, to provide oversight of the Edward Byrne Memorial Fund, the fund that underwrote the Tulia drug sting.

What has the Civil Rights Division recommended to the Edward Byrne Memorial Fund regarding racial profiling? What recommendations has the Division made with respect to steps that DOJ can take to hold local police departments accountable for their use of these types of funds?

Warren, Ohio, Case:

What is the status of the Warren, Ohio, Police Department investigation?

Honorable R. Alexander Acosta
Page Seven
March 11, 2004

United States v. City of Buffalo

In that case, the court ordered the City to develop a valid police examination and entered a remedial applicant flow hiring order which was to remain in effect until the City developed such a test. Despite the fact that the City to this date has not shown the validity of its police exam, the Justice Department has now reversed its earlier positions in this case. The Department is now contending that the order of the court should be dissolved, irrespective of the validity of the examination or whether the exam in future applications would have an adverse impact and filed a motion with the intent to do so.

Could you please explain why the Department has now changed its position on the need to show the validity of the examination before dissolving the decree? What prompted this reversal in the Department of Justice's litigation in this matter?

DOJ filed an appeal to the Second Circuit of Judge Curtin's rejection of DOJ's argument that the remedial applicant flow hiring order and the requirement of a valid selection process was unconstitutional race conscious relief. Is it true that DOJ withdrew last month?

It is our understanding that the Department of Justice is also contending that a continuation of this applicant flow order or the hiring individuals who were to be hired pursuant to this order violates both Title VII and the United States Constitution.

In this case, Judge Curtin's June 18, 2002, order stated that "because the Government appears to have changed its position and now asserts that any appointment according to the shortfall agreement would be contrary to statute and unconstitutional, briefs shall be filed as to this problem."

Would you agree that U.S. Supreme Court's articulation that the benefits of diversity "are not theoretical but real" and that "major American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints" in *Grutter v. Bollinger*, 539 U.S. 306, 334 (2003) supports the legality of the valid selection process requirement in the Buffalo case?

Insofar as there have been no intervening Supreme Court decisions having a direct bearing on this litigation, this appears to be a strictly a policy switch within the Justice Department. Could you please describe to the Subcommittee what precipitated this change?

Can you tell this Committee if DOJ has taken this position in any other pending litigation where they are a party or if the Department plans on doing so in the future?

Honorable R. Alexander Acosta
Page Eight
March 11, 2004

Cross Burnings:

Could you supply the members of the Committee with a detailed docket on your cross burning cases?

GAO Study:

We wish to reiterate Rep. Nadler's concerns expressed during our hearing concerning cooperation with requests from the General Accounting Office. We appreciate your commitment that you will take steps to ensure timely cooperation with the General Accounting Office in its work. GAO is an arm of Congress and each request should be treated as coming from the Members themselves. Please keep us informed of your efforts to ensure appropriate cooperation with the General Accounting Office.

Persons With Limited English Proficiency:

During your confirmation hearing, the committee discussed the responsibility of the Civil Rights Divisions implementation of Executive Order 13166 and its guidance, Improving Services to Services for Persons with Limited English Proficiency. Since your confirmation, there have been a number of guidances that have been published that conform to the DOJ guidance that was developed under your leadership. On August 8, 2003, prior to your confirmation, The Department of Health and Human Services issued its revised guidance for comment under EO 13166. Comments on the HHS Guidance were due on January 6, 2004. It is our understanding that many of the comments that were submitted to HHS claimed that HHS guidance did not conform to the DOJ Guidance. Based on the comments received, has HHS submitted a revised guidance to your office for approval and when do you expect the final HHS guidance will be published in the Federal Register? If not, what time frame have you established with HHS to submit a revised draft guidance to your office responding to those comments?

Positions Before the U.S. Supreme Court

How does your office interface with other enforcement agencies, particularly the EEOC, on government positions taken before the U.S. Supreme Court?

What dictates a decision to oppose other enforcement agency positions, such as the EEOC, on positions argued before the U.S. Supreme Court?

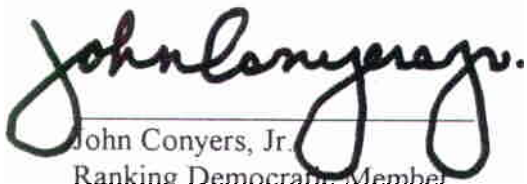
For example, in *Costa v. Desert Palace*, the EEOC and the Solicitor General advocated opposite positions. Was the SG's position consistent with your office's recommendation in this case?

Honorable R. Alexander Acosta
Page Nine
March 11, 2004


In the constructive discharge case currently before the U.S. Supreme Court, *Pennsylvania State Police v. Suders*, what position did your office recommend to the SG?

Thank you for your time and attention to this matter. We look forward to your responses.

Sincerely,



John Conyers, Jr.
Ranking Democratic Member
Committee on the Judiciary



Jerrold Nadler
Ranking Democratic Member
Subcommittee on the Constitution

cc: Hon. F. James Sensenbrenner
Hon. Steve Chabot